Martin Marietta Energy Systems, Inc. *and* Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL–CIO. Cases 9–CA–28932, 9–CA–29195, and 9–CA–29669

March 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues presented in this case[1] are whether the judge correctly found: that the Respondent violated Section 8(a)(5) of the Act by refusing to provide bargaining information requested by the Union, by unilaterally changing unit employees' terms and conditions of employment without reaching a valid impasse in bargaining with the Union, and by refusing to process employee grievances; and that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge for violating a unilaterally promulgated no-strike rule.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] as modified below, and to adopt the judge's recommended Order as modified.[5]

1. The Respondent asserts that the judge erred by failing to make a credibility finding relevant to the question of whether it had an obligation to provide the Union with requested information about the cost of unit employees' health insurance coverage. The Respondent contends that production of certain cost information would have been unduly burdensome. It further contends that Ronald Wilson, its chief negotiator, informed the Union that to obtain the requested information would require purchasing a costly computer program and that the Union refused to bargain over any allocation of costs.

Wilson's testimony fails to establish the Respondent's defense. He testified that on April 9 and 10, 1991,

> A. . . . Mr. Sparks [the Respondent's health plan administrator] explained to the Union that this information we do not have, it's all on computer tapes, we would have to ask the carrier to make a special run, it would cost several thousand dollars. And I told Mr. Knauff [the Union's negotiator] we don't have a need for it and you know, if they wanted they have to pay for it.
>
> Q. And what was Mr. Knauff's response to that?
>
> A. Mr. Knauff said he was not going to pay for it. And I said we don't have any need for it.

Even assuming the credibility of this testimony, it does not meet the Respondent's burden of proving the truth of its contentions that production of the requested information would be unduly burdensome. There is no showing that Wilson had anything more than an unverified assumption about what the requested information would cost or that he ever confirmed that assumption by requesting cost information from the insurance carrier. Thus, the Respondent has not demonstrated a burdensome financial impact so as to put the Union on notice of a need to bargain about the allocation of costs associated with compiling the information sought. See *Tower Books*, 273 NLRB 671 (1984). Indeed, Wilson's testimony shows only that he made an unconditional demand that the Union pay all costs if it wanted this information. Under these circumstances, we affirm the judge's finding of a Section 8(a)(5) violation.[6]

2. We agree with the judge's conclusion that the Respondent's failure to process grievances violated Section 8(a)(5) of the Act. In so finding, however, we

[1] On February 23, 1994, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed limited exceptions and an answering brief. The Respondent filed a reply brief to the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We note that there are no exceptions to the judge's recommendation to dismiss certain allegations of the complaint.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Although we agree with the judge that the parties had not reached a valid impasse in bargaining prior to the Respondent's unilateral implementation of changes in April 1992, we do not rely on the judge's unqualified statement that an employer may not propose continued negotiations and at the same time declare an impasse. We also do not rely on his conclusion that the Respondent's unlawful failure to provide information requested by the Union tainted the alleged bargaining impasse.

[5] The judge did not include affirmative provisions in his recommended Order requiring the Respondent, upon request from the Union, to reinstate unlawfully changed terms and conditions of employment and to make whole employees for monetary losses, if any, resulting from those changes. We shall modify the recommended Order and substitute a new notice including these traditional remedial requirements. Any backpay owed by the Respondent is to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] The Respondent violated Sec. 8(a)(5) with respect to other information. We agree with the judge that the Respondent has not established the defense that the furnishing of this information would be unduly burdensome. In addition, we agree with the judge that this defense is undermined to some extent by the fact that the Respondent produced the information, albeit in an untimely fashion.

note that the judge incorrectly referred to the Respondent's failure to process grievances arising under the parties' expired collective-bargaining agreement. The record supports the Respondent's contention that, with a notable exception, it continued to process grievances in accord with the four-step procedures of the expired contract. The exception involved all grievances which challenged the Respondent's conditions for strikers' return to work and the unilateral changes implemented in April 1992. The Respondent classified more than 1000 grievances filed between April 6, 1992, and May 31, 1993 (over a third of all grievances filed in that period), as falling within this category. The Respondent admits that it did not follow the established grievance step procedures in summarily denying these grievances, but it contends that it would have been futile to do more than reject grievances which it believed would ultimately be resolved in unfair labor practice litigation.

As a general rule, parties to a collective-bargaining relationship have a continuing statutory obligation to adhere to established grievance procedures even after the expiration of a contract. *Bethlehem Steel Co*., 136 NLRB 1500 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963); *Indiana & Michigan Electric Co*., 284 NLRB 53, 54–55 (1987).[7] In certain limited circumstances, however, the pendency of unfair labor practice charges may present a defense to a refusal to bargain about grievances involving the same allegations made in those charges. *Airport Aviation Services*, 292 NLRB 823, 830 (1989).[8]

We find no merit in the Respondent's reliance on *Airport Aviation*. Unlike the situation in that case, there were no unfair labor practice charges pending when the Respondent began rejecting the grievances at issue. It was not until June 12, 1992, that the Union filed a charge in Case 9–CA–29669 which alleged, inter alia, that the Respondent made unlawful unilateral changes on and after April 6, 1992. (The same charge alleged the unlawful refusal to process grievances.)

Furthermore, the refusal in *Airport Aviation* was limited to a specific class of grievances involving the dismissal of probationary employees. Consequently, the respondent employer's conduct did not threaten the viability of the basic bargaining relationship or ''obstruct the overall functioning of the process of grievance resolution.'' Id. at 830. In contrast, the Respondent's refusal to follow grievance procedures here encompassed a broad range of grievance issues having to do with numerous, unilaterally imposed conditions for strikers' return to work and changes in unit employees' working conditions. As indicated, more than a third of all grievances filed in the year following the end of the strike entailed such issues. Notwithstanding the Respondent's willingness to process other grievances in accord with established procedures, we find that the breadth of the class of grievances which it refused to process by those procedures was such that its refusal constituted ''obstruction of the overall functioning of the process of grievance resolution.'' We therefore agree with the judge's finding that the Respondent violated Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Martin Marietta Energy Systems, Inc., Piketon, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) On the Union's request, process the grievances at issue in this proceeding.''

2. Insert the following as paragraphs 2(c) and (d), and reletter the subsequent paragraphs.

''(c) Reinstate all terms and conditions of employment of bargaining unit employees that were unilaterally changed following the Respondent's unlawful bargaining impasse.

''(d) Make whole all employees for any losses they may have suffered by reason of the Respondent's unlawful unilateral changes in their terms and conditions of employment.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL–CIO as the exclusive collective-bargaining representative of an appropriate unit of our employees, by unilaterally announcing and implementing any changes in unit employees' terms and conditions of employment unless we have reached impasse in good-faith collective bargaining with the Union.

[7] We disavow the implication in fn. 7 of the judge's decision that parties have a comparable statutory duty to arbitrate after expiration of a collective-bargaining agreement. See *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977); *Indiana & Michigan Electric*, supra.

[8] Cf. *Cherry Hill Textiles*, 309 NLRB 268 (1992), where the Board found that the Respondent did not violate Sec. 8(a)(5) by refusing for 17 days to *arbitrate* a single grievance raising the same issue as in unfair labor practice charges pending before the Board.

WE WILL NOT refuse to process grievances in accord with procedures set forth in the expired 1988 contract with the Union.

WE WILL NOT refuse to furnish information requested by the Union concerning the cost of health care and the cost of training unit employees.

WE WILL NOT threaten employees with discharge for violating a unilaterally promulgated no-strike clause.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL–CIO as the collective-bargaining representative of the unit employees.

WE WILL, on request by the Union, reinstate any term and condition of unit employees' employment which we unilaterally changed on and after April 6, 1992, and WE WILL make whole all employees for any losses they may have suffered by reason of those unilateral changes.

WE WILL, on request by the Union, process those grievances which we have previously refused to process in accord with the procedures set forth in the expired 1988 contract.

WE WILL, on request by the Union, provide information about the cost of health care and the cost of training unit employees that we have previously refused to provide.

WE WILL rescind any unilaterally promulgated no-strike clause threatening employees with discharge for striking.

MARTIN MARIETTA ENERGY SYSTEMS, INC.

Patricia Rossner Fry, Esq., for the General Counsel.
Thomas M. Tarpy and *Andrew C. Smith, Esqs.*, of Columbus, Ohio, for the Respondent.
John R. Doll, Esq., of Dayton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. Upon charges filed by Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL–CIO (Union or Charging Party) the Regional Director for Region 9 issued an order consolidating cases, second consolidated complaint and notice of hearing dated November 25, 1992, alleging that Martin Marietta Energy Systems, Inc. (Respondent or Employer) had violated Section 8(a)(1) of the Act by unilaterally promulgating a no-strike clause threatening employees with discharge for striking, and Section 8(a)(3) of the Act by failing to pay striking employees vacation pay. The consolidated complaint also alleges violations of Section 8(a)(5) by refusing to furnish the Union with information concerning the cost of training unit employees and information concerning health care costs; insisting that the Union agree to contract provisions providing that Department of Energy (DOE) orders, directives, and regulations would supersede conflicting contract provisions; unilaterally implementing new working conditions included in its bargaining proposals in the absence of a lawful impasse in negotiations; and refusing to process certain grievances filed after striking employees returned to work. This case was heard before me on August 17 through August 20, 1993. Briefs have been timely filed by General Counsel, Respondent, and Charging Party, which have been considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer is a corporation engaged in the production and sale of enriched uranium at its Piketon, Ohio facility. During the past 12 months, the Employer, in conducting these operations, sold and shipped from its Piketon, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Federal government, under the aegis of the Department of Energy (DOE), is the owner of a uranium enrichment plant in Piketon, Ohio. The plant was operated under contract with the DOE by Good Year Atomic Corporation until 1986, when the Respondent took over the operation of the plant, also under contract with DOE.

The approximately 1000 hourly employees at the plant have been represented by the Union since 1955. When Respondent took over the plant in 1986, it assumed the existing collective-bargaining agreement with the Union which expired in 1988. A successor contract was negotiated in 1988 with an expiration date of 12:01 a.m., May 2, 1991.[1]

In late 1990, prior to the start of negotiations for a new contract, which began in March 1991, the Respondent identified to the Union certain major issues upon which it would be seeking changes. Specifically, with respect to the matter of overtime, Respondent wanted changes to allow it more flexibility in the assignment of overtime. As to the ''movement'' issue, Respondent was seeking changes to allow it to fill vacancies without observing restrictive job bidding practices which it contends caused excessive job movement within work groups and job classifications. As to shift overlap, Respondent wanted changes from the existing overtime guarantees of at least 4 hours' pay, no matter how much overtime is worked. Respondent was proposing 12 minutes of paid overtime, 4 hours' overtime only if the overtime exceeded 12 minutes.[2] Another issue was the matter of DOE directives. Since Respondent operates under the supervision of the

[1] All dates refer to 1991 unless otherwise indicated.

[2] Shift overlap was desirable to ensure smooth transitions between shifts.

DOE, it sought a provision in the new contract which would give DOE directives precedence over the provisions of the contract in the event of a conflict with the contract. As to the matter of drug testing, Respondent sought the implementation of a drug testing program.

Negotiations for a new contract began on March 27, at which time the parties simply exchanged written proposed revisions to the existing contract, and the next meeting was set for April 8.[3]

One of the changes being explored by the Union was health insurance coverage. Respondent is self-insured under a plan administered by Connecticut General Insurance Company, with employees contributing 6 percent of the cost of their coverage. According to the Union, premiums were rising and it sought information from the Respondent as to the calculations used to compute the employees' 6-percent contribution. The information had been requested to provide Blue Cross-Blue Shield with total health cost information in order to enable it to bid on health care coverage. Some information was provided, but information concerning claims in excess of $25,000 was not provided nor were the claims broken down by health care provider. This information was not provided until, pursuant to litigation by the Union in December 1992, the Respondent disclosed documents revealing breakdowns of various cost items, including cost of coverage for individuals. Those calculations needed to compute the 6-percent employee contribution figure have never been supplied.

Beginning on April 8, the parties engaged in some 15 bargaining sessions during the month of April. However, while some agreements were reached, there was no significant progress by the parties on the major issues. On April 30, Respondent presented to the Union a document captioned ''Comprehensive Offer for Settlement of All Noneconomic and Economic Items.'' This proposal was unacceptable to the Union, and it submitted to the Respondent a one-page document, ''Union Comprehensive Counter to Company Offer on 4/30/91.''

On May 1, as the contract was expiring, Respondent submitted to the Union a document captioned ''Best and Final Offer for Settlement of All Noneconomic and Economic Items.'' This was a comprehensive proposal revising some of the prior day's proposals, but maintaining Respondent's basic position on those items most important to it.

At this point, the contract having expired, Respondent's last offer was brought to a vote before the membership. It was not supported by the union negotiating committee, and the proposal was rejected by the membership.

On May 21, the Union, in a document captioned ''Union Comprehensive Counter to Provide Resolution on Major Issues,'' proposed revisions to several existing contract provisions and stating as to seven Respondent proposals that they ''must be withdrawn,'' including several which had been the most difficult to resolve.

The parties continued to meet, with sessions on May 22, June 10 and June 11, but failed to reach agreement on a contract, and on June 11, the Union struck the plant. The plant, however, continued to operate, utilizing management and nonunit employees.

Prior to the strike, many employees had already scheduled vacations. It was the policy of Respondent to pay these employees, now on strike, for their vacation time at the time the vacation was scheduled. However, due to the failure of some supervisors to submit employee timecards showing the scheduled vacation, several unit employees were not paid at the time of their scheduled vacation. These situations were, however, rectified once they came to the attention of Sharon Williams, Respondent's department head in charge of union relations.

Shortly after the strike began, in what were described as ''leaks'' to the press, Respondent was quoted as saying that bargaining unit training costs incident to the job movement of employees were costing $670,000. This issue had first been raised in negotiation by the Respondent on April 9 in a document captioned ''Movement Impacts,'' which recites job movement as creating ''Training Costs.''

After the strike began, the Union requested at two negotiating sessions that Respondent furnish information about the need for training and the costs associated with training. Respondent declined to provide the information at the time, although it was finally provided in September 1992 after the unfair labor practice charges herein had been filed.

After the strike began, negotiations were resumed on July 12 and the parties continued to meet during the strike. Wilson continued to promote his position that relief on the significant issues was essential, but the Union continued to resist any substantial revisions in its own proposal on those matters.

In October 1991, a new Federal mediator was brought in to assist the negotiations and the parties continued to meet both on and off the record to resolve the key issues, but without success.

During January and until February 15, 1992, the parties held some 16 negotiating session and at about 4 a.m. on February 15, Respondent submitted to the Union a comprehensive written proposal captioned ''Offer for Settlement of All Noneconomic and Economic Items.'' This proposal discloses several revisions by Respondent on many of the key issues, including a drug program, DOE orders, realignment, job posting, shift overlap pay, and overtime. This proposal also contained a section captioned ''Conditions of Return to Work,'' reciting certain reporting and training requirements for returning strikers. Later on February 15, Wilson requested Knauff to present the proposal to the membership for a vote. However, at about 6 p.m. that day, Knauff rejected the proposal, concluding that it was still inadequate, and declined to present it to the membership. The Union then submitted its own counterproposal to the Respondent captioned ''Union Comprehensive Counter-Offer for Settlement of All Noneconomic and Economic Items.'' In this proposal, the Union revised its position on the drug program, DOE orders, realignment, shift overlap, and overtime. However, these proposals were not acceptable to the Respondent.

With respect to the DOE orders, the parties were still in disagreement. In an effort to resolve this major obstacle to settlement, Union International President Robert Wages and Respondent Vice President Robert Leonard, met off the record. However, their efforts failed and although they exchanged revised proposals, the basic conflict persisted. The

[3] It appears that the principal spokesmen for the negotiations were Mack Wilson, vice president human resources, for the Respondent, and John Knauff, union president.

Union still sought bargaining prior to implementation of any DOE order, and Respondent proposing immediate implementation and thereafter bargaining over the effects of the implementation. The Respondent did, however, revise its proposal to provide that wages, seniority, and fringe benefits could not be affected by DOE orders. On March 20, 1992, the parties exchanged, at the local level, the same proposals exchanged between Wages and Leonard.

On March 23, 1992, after some discussion about the possibility of ending the strike and returning to work, the membership authorized the union negotiating committee to make an unconditional offer of return to work. This was done by letter dated March 27, 1992. Respondent agreed to the return of strikers under certain conditions, but the Union declined to define the term, simply reiterating that its return would be ''unconditional.'' On April 1, 1992, Respondent distributed a letter signed by Wilson reciting the terms and conditions under which employees would be allowed to return to work. The letter, captioned ''Company's Response to Union's Unconditional Offer to Return to Work,'' reads:

> The Company accepts the Union's unconditional offer dated March 27, 1992 to return to work. Employees will return to work on Monday, April 6, 1992 unless otherwise advised to the contrary by the Union. Employees will report to the Stone & Webster Building (SWEC) at the times indicated in *Attachment A, Return to Work Schedule for Monday, April 6, 1992*, to begin the required reentry training. Until ratification of a new collective bargaining contract, the returning employees' wages, hours and conditions of employment shall be as contained in the Company's *Offer for Settlement of all Noneconomic and Economic Items*, dated February 15, 1992, as modified on March 20, 1992, with respect to Protective Security and DOE Orders and Conditions of Return to Work, *Attachment B*, which offer shall become effective April 6, 1992.
>
> All returning employees shall receive a 2.5% increase effective April 6, 1992.
>
> The operator and Steam Plant upgrades shall also become effective April 6, 1992. These upgrades are in addition to the 2.5% wage increase and apply to the following classifications:
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> | | |
> |---|---|
> | Assistant Boiler Operator | Uranium Material Handler |
> | Power Operator | Utilities Operator |
> | Boiler Operator | Production Process Operator |
> | Chemical Operator | Uranium Material Handler-in-Training |
> | Distribution and Inspection Operator | Stationary Engineer |
>
> Article V (Continuity of Operation) will be in effect for a period of at least 180 calendar days following April 6, 1992. The Union will give 15 calendar days written notice to the company prior to the date a strike would commence after the 180-day period.
>
> The acceptance shall have no effect whatsoever on the current bargaining proposals of either party in the negotiations for a new collective bargaining contract. Upon request by the Union the Company will resume negotiations at mutually agreeable times and places. The negotiating positions of the parties shall not be compromised or prejudiced in any way by this response.
>
> Both parties will endeavor to return the plant to normal operations as safely and smooth as possible.[4]

Despite their disagreement with the conditions set out by Respondent in this letter, the striking employees nonetheless returned to work on April 6 and Respondent implemented the terms and conditions of employment described above.

After the strikers returned to work, the Union filed numerous grievances. Respondent refused to process any grievances having to do with the newly implemented terms and conditions of employment, that is, Respondent's February 15, 1992 contract proposal, together with its March 20, 1992 DOE proposal, or those grievances dealing with ''Conditions of Return to Work'' dated March 20, 1992, such as retraining.

Following the return to work on April 6, 1992, negotiations continued on a new contract with bargaining sessions being held on April 16, 1992, and continuing with about six more meetings during the period from May 6 through June 5, 1992.

Sometime during the summer of 1992, the Respondent decided, in compliance with provisions of Federal legislation drafted to protect existing employees during the establishment of a ''United States Enrichment Corporation,'' that it would return to and abide by the contract in effect on April 30, 1991, pending either the negotiation of a new contract, or the end of a 2-year period beginning on October 24, 1992, whichever comes first.[5]

B. *Analysis and Recommendations*

1. Unilateral implementation of terms and conditions of employment—impasse

As a matter of Board and court law, an employer may not unilaterally implement changes in the working conditions of employees, even after the expiration of a contract, unless an impasse has been reached in negotiations between the parties. *NLRB v. Katz*, 390 U.S. 736 (1962).

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[4] Attachments to the letter are omitted but appear in the record as part of G.C. Exh. 30.

[5] Federal legislation providing for the establishment of a wholly owned government corporation known as the ''United States Enrichment Corporation'' appears in 42 § 2297. Specifically, 42 § 2297 (b) 4(e)(1) and (2), which read:

> (e) Protection of existing employees
>
> (1) In general
>
> It is the purpose of this subsection to ensure that the establishment of the Corporation pursuant to this subchapter shall not result in any adverse effects on the employment rights, wages, or benefits of employees at facilities that are operated, directly or under contract, in the performance of the functions vested in the Corporation.
>
> (2) Applicability of existing collective bargaining agreement
>
> Any employer (including the Corporation) at a facility described in paragraph (1) shall abide by the terms of a collective bargaining agreement in effect on April 30, 1991, at each individual facility until—
>
> (A) the earlier of the date on which a new bargaining agreement is signed; or
>
> (B) the end of the 2-year period beginning on October 24, 1992.

It is the position of the General Counsel that the parties were not at impasse in the negotiations for a collective-bargaining agreement when the striking employees returned to work on April 6, 1992, and that absent such an impasse, Respondent violated Section 8(a)(5) of the Act by implementing its last offer of February 15, 1992, at that time. Respondent contends that impasse had been reached and that, under existing Board and court law, it was privileged to implement the provisions of its last proposal.

The criteria for determining whether or not impasse exists at any given time is a matter of judgment based on the relevant considerations, some of which were identified by the Board in *Taft Broadcasting*, 163 NLRB 475, 478 (1967), wherein the Board states:

> Whether bargaining impasse exists is a matter of judgment, the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

It is necessary therefore to review the record here and to determine the status of negotiations on April 1 when the Respondent announced and then implemented its last proposal. Having done so, I am satisfied that no impasse in bargaining existed at the time Respondent announced and implemented the provisions contained in its April 1 letter captioned ''Company's Response to Union's Unconditional Offer to Return to Work.''

While it is true that little progress was made over the course of previous bargaining sessions on many of those issues most important to the Employer, the fact that many bargaining sessions preceded the implementation does not, without more, support the conclusion that impasse had been reached. To resolve that issue, one must look at the state of affairs at the critical time when the proposal was implemented. In the instant case, progress was made in negotiations during January and February 1992. On February 15, 1992, the parties had exchanged proposals containing substantial revisions from those contained in the previous proposals, and on March 20, proposals were exchanged on the DOE issue, substantially modifying the prior positions of the parties.

But even more significantly, the record discloses that even after the strikers returned and Respondent's proposals were implemented, further contract negotiations between the parties had been contemplated and did in fact take place.[6] It is evidence that poststrike contract negotiations were contemplated in letters from the Respondent dated March 27 and April 1. Respondent does not assert the existence of any impasse in either of these letters.

How is it possible to conclude that further bargaining would have been futile, when the parties themselves intend to continue to negotiate and do so? It seems to me that Respondent may not propose continued negotiations and at the same time declare an impasse. These are inconsistent concepts. In my opinion, it was the ''contemporaneous understanding'' of the parties that contract negotiations would continue after the strikers returned to work and that impasse had not been reached.[7] To conclude that further negotiations would be futile would be to substitute my judgment for the perception of the parties.[8]

[6] Poststrike negotiations were first scheduled for April 6 and 7, 1992, subsequently postponed to begin April 16, 1992.

2. No-strike clause

As a part of its ''Response'' letter of April 1, 1992, Respondent states that the ''Continuity of Operations'' provision (article V) of the 1988 contract will be in effect for at least 180 days after April 6 (the date the strikers returned to work) and that thereafter, the Union will give 15 calendar days written strike notice to Respondent. The 1988 contract provides for discharge of any employee in violation of article V.

In its totality, article V, as expanded by the time constraints set out by Respondent in its ''Response'' letter, provides for the discharge of any employee violating article V. This is tantamount to a new condition of employment containing a threat of discharge to employees who violate those conditions. In my opinion, this constitutes an unlawful threat to employees in the exercise of their right to strike under Section 7 of the Act, and this is true regardless of whether or not it would have violated Section 8(a)(1) for Respondent to have promulgated the no-strike clause which did not contain such a threat. Therefore, Respondent's citation of *McClatchy Newspapers*, 307 NLRB 773 (1992), is inapposite.

3. Department of Energy (DOE) orders

The General Counsel alleges in its complaint that Respondent violated Section 8(a)(5) of the Act by demanding ''as a condition of consummating any collective-bargaining agreement that the Union agree to a provision that any orders, directives or regulations issued by the United States Department of Energy (DOE) would supersede any contractual provisions.'' As defined by the Supreme Court in *Borg-Warner*,[9] mandatory bargaining subjects are those subjects which relate to wages, hours, and other terms and conditions of employment. There exists a duty to bargain in good faith on those subjects. As for other matters, the parties are free to bargain or not to bargain without violating their duty to bargain under Section 8(a)(5) of the Act.

With respect to these permissive subjects of bargaining, however, neither Union nor Employer may insist to impasse on such subjects. Neither may they condition agreement to any contract on the inclusion of the permissive proposal; nor

[7] Having concluded that there was no impasse in negotiation when the striking employees returned to work, it is clear that the terms and conditions of employment for returning employees, including the grievance and arbitration provisions, would be those contained in the expired 1988 contract. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977); *Columbia Portland Cement Co.*, 294 NLRB 410 (1989). Accordingly, I find that by refusing to process grievances arising under the 1988 contract, Respondent violated Sec. 8(a)(5) of the Act.

[8] Having also concluded below that Respondent violated Sec. 8(a)(5) of the Act by refusing to furnish information concerning health care costs and training costs to the Union, I also conclude that any alleged impasse was tainted by Respondent's own unlawful activity.

[9] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

condition further bargaining on acquiescence to the permissive subject. *Taft Broadcasting Co.*, 274 NLRB at 261.

First, we must determine whether or not the subject was permissive or mandatory. General Counsel and Charging Party contend that the DOE item is a permissive subject, i.e., not related to terms or conditions of employment since it represents an effort by the Respondent to voluntarily assume obligations under a contract with a customer, thereby vesting in this third party, all control over any provision of the collective-bargaining agreement.

Respondent, on the other hand, contends that since it has an obligation under its contract with the DOE for the operation of the facility which requires compliance with DOE orders, regulations and directives, that the subject is a mandatory bargaining subject because it directly affects the work relationship between Respondent and its employees.

In my opinion, DOE orders, directives, and regulations, although emanating from a third party (DOE), nonetheless relate directly to the working conditions of employees, and the issue is a mandatory bargaining subject. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).[10]

Moreover, even assuming, arguendo, that the DOE item were a permissive subject, I would not conclude, based on this record, that Respondent were insisting on it to impasse or as a precondition to further bargaining. The parties had voluntarily bargained concerning the DOE matter. Both had modified their original proposals. Further, no impasse was reached nor does the evidence support the conclusion that further bargaining was conditioned on the Union's acquiescence to the Respondent's position on the DOE matter.

4. Refusal to furnish information

The General Counsel contends that Respondent violated Section 8(a)(5) of the Act by refusing to provide information to the Union concerning health care costs for unit employees and information concerning training costs for employees in the unit.

With respect to the health care costs, it appears, as noted above, that the Respondent is self-insured under a plan administered by Connecticut General Insurance Company. The cost to unit employees is 6 percent of the total health care coverage.

The Union requested Respondent to provide information disclosing its costs, particularly those including large claims over $25,000, and the amounts paid to certain providers. The reason for seeking this information was to provide other insurance companies, notably Blue Cross-Blue Shield, with the information necessary for them to bid for coverage. Those calculations used in arriving at the 6-percent employee contribution were sought because the Union wanted a breakdown of the factors used to arrive at the 6-percent figure.

Under Board and Court law, a union is entitled to information necessary and relevant to its function as the collective-bargaining representative of unit employees. In the instant case, the parties were negotiating a new contract and the information sought, in my opinion, was relevant to proposals being explored by the Union for presentation to the Respondent. The information sought was clearly relevant to the Union's collective-bargaining responsibilities. It is undisputed that some information was provided in April 1991, however no breakdown of cost information showing claims paid for unit employees or the actual covered membership on a monthly basis was provided. Respondent contended at the time that the information was not available. In a lawsuit brought by the Union, however, much of the requested information was provided in the fall of 1992 pursuant to litigation brought by the Union. Information to determine the calculations comprising this 6-percent employee contribution has never been produced.

Respondent argues that it gave the Union all the information available to it and that it would have been unduly burdensome for Respondent to have complied with the additional information request made by the Union. This contention is not supported by the record, however, particularly where a substantial amount of the information sought was later produced during litigation in the fall of 1992.

Turning now to the Union's request for information related to job training costs, it is clear that during negotiations the matter was raised by the Respondent in reciting that training costs, in essence, were an ''Impact'' and, therefore, one would assume, a consideration in Respondent's contract proposals to reduce job movement. But Respondent contends that it did not claim any inability to pay training costs and therefore was under no obligation to provide any breakdown of training costs as requested by the Union. I do not agree. Once having raised the matter of training costs as an impact of job movement, Respondent may not now be heard to justify denial of that information on the grounds that it did not profess any inability to pay. Accordingly, I conclude that by refusing to furnish both the health care cost and training cost information requested, Respondent violated Section 8(a)(5) of the Act.[11]

5. Vacation pay

Vacations were normally scheduled through employees' immediate supervisor; and at the time an employee took the scheduled vacation, it was the responsibility of the supervisor to submit the employee's timecard so that the employee could be paid.

During the strike, supervisors were instructed to submit employee timecards showing scheduled vacation at the time the vacations were scheduled so that even though the employee was on strike, he could be paid at time.

Despite these instructions, it appears that some 10 employees, out of approximately 200 to 300 who had scheduled vacation, were not paid for their vacation at the time it was scheduled because of a failure by their supervisors to submit their timecards. It is undisputed that when these instances were called to the attention of management, the vacation time was paid.

Under circumstances where scheduled benefits have been withheld, it is the burden of the General Counsel to show that these benefits were due and payable, which has been done, and also to show that the benefit was withheld on the

[10] In reaching this conclusion, I am persuaded, based on this record, that the orders, regulations and directives of the DOE are not simply advisory. If Respondent were free to disregard DOE orders, regulations, or directives, another conclusion might be reached since, under that scenario, insistence on bargaining those matters would be outside the scope of the employer-employee relationship.

[11] Nor do I agree with Respondent that any violations are ''technical'' and too insignificant to be worthy of a remedial order.

apparent basis of the strike. *Texaco, Inc.*, 285 NLRB 241 (1987). This, the General Counsel has not done. The facts disclose that while a relatively few employees were not paid their vacation time when the vacation was scheduled, the failure to pay them on time was due to a failure on the part of supervisors to timely submit their timecards. There has been no showing that the failure was intentional or discriminatory. It is not difficult to envision in a strike situation, while the plant is being operated by management employees, for this to occur. Had these employees been working, they could have promptly advised their supervisors and the problem could have been promptly resolved.

In short, I cannot conclude that the temporary failure to pay vacation pay to a few employees, where the failures were rectified by Respondent when it became aware of them, violates Section 8(a)(3) of the Act.

Moreover, even assuming that the General Counsel had satisfied its burden of making a prima facie showing, I am satisfied, based on the entire record, that Respondent has shown that any temporary failure to pay vacation benefits was and not motivated by discriminatory considerations nor was it inherently destructive of any Section 7 employee rights. See *Texaco, Inc*., supra at 246. Accordingly, I conclude that Respondent did not violate Section 8(a)(3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, as set forth in section III, above, in connection with Respondent's operation described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Martin Marietta Energy Systems, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, Local 3-689, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the following described unit has been an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly employees, excluding police and salaried personnel as set forth in the National Labor Relations Board certification in Case No. 9-RC-2361.

4. At all times material herein, the Union has been and is now the exclusive representative of the employees in the above-described bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent and the Union were parties to a collective-bargaining agreement effective May 2, 1988, through May 1, 1991.

6. By unilaterally announcing and implementing on April 1, 1992, its comprehensive contract proposal of February 15, 1992, and its proposal relating to ''Protective Security and DOE Orders'' without a valid impasse having been reached, Respondent violated Section 8(a)(5) of the Act.

7. By refusing to process grievances under the expired 1988 contract after unit employees returned to work on April 6, 1992, Respondent violated Section 8(a)(5) of the Act.

8. By refusing to furnish information concerning the cost of health care and the cost of training unit employees, Respondent violated Section 8(a)(5) of the Act.

9. By threatening employees with discharge for violating a unilaterally promulgated no-strike clause, Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Martin Marietta Energy Systems, Inc., Piketon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively within the meaning of the Act by unilaterally announcing and implementing on April 1, 1992, its comprehensive contract proposal of February 15, 1992, and its proposal relating to ''Protective Security and DOE Orders'' without valid impasse having been reached.

(b) Refusing to process grievances under the expired 1988 contract after the unit employees returned to work on April 6, 1992.

(c) Refusing to furnish information concerning the cost of health care and the cost of training unit employees.

(d) Threatening employees with discharge for violating a unilaterally promulgated no-strike clause.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the collective-bargaining representative of unit employees.

(b) Upon request, process, under the grievance and arbitration provisions of the expired 1988 contract, those grievances arising after the expiration of that contract.

(c) Furnish, on request, information concerning the cost of health care and the cost of training unit employees.

(d) Rescind any unilaterally promulgated no-strike clause threatening employees with discharge for striking.

(e) Post at its Piketon, Ohio facility copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the

Continued

provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''